United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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77-7229

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANTONIO MARRALE,

Plaintiff-Appellee,

—against—

CIA MAR DE NAV LLOYD BRASILIERO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLEE'S BRIEF

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STATEMENT OF ISSUES

1. Where the negligence of a shipowner has contributed, in material part, to the creation of a condition aboard the ship which is dangerous to longshoremen loading cargo, is the shipowner liable for injuries suffered by one of the longshoremen as a result of said condition?

2. Where a shipowner has actual knowledge of the existence of a condition aboard the ship which is dangerous to longshoremen loading cargo, and which has been created, in material part, by the negligence of the stevedore (and, in material part, by the shipowner), is the shipowner liable to one of the longshoremen who suffers injuries as a result of said condition?

3. Where a shipowner has constructive knowledge of a condition aboard the ship which is dangerous to longshoremen loading cargo, and which has been created, in material part, by the stevedore, is the shipowner liable for injuries suffered by one of the longshoremen as a result of said condition?

4. Where the shipowner has actual or constructive knowledge of the existence of a condition aboard the ship which is dangerous to longshoremen loading cargo, and the shipowner, because of the dangerous condition, has the right or power to stop loading operations, until the condition is corrected, is the shipowner deemed to be exercising such control over said operations as to subject it to liability for injuries sustained by one of the longshoremen as a result of the dangerous condition?

5. Was the verdict on damages in this case excessive?

6. In the absence of any attempt by a defendant either to controvert the medical proof of injuries introduced on behalf of a plaintiff, or to show any improvement in his condition during the period of four (4) years which has elapsed from the date of the accident to the time of trial, will a verdict for damages be deemed excessive?

THE EVIDENCE AS TO LIABILITY

Plaintiff's Witnesses

The plaintiff, ANTONIO MARRALE

On May 31, 1973, the day of the accident herein, the plaintiff, ANTONIO MARRALE - who testified through an interpreter (3 et seq.*) - was 48 years old, less nine (9) days (cf. 4, top, and 5, bottom). He worked as a longshoreman, and, at the time of the trial, had been so employed for eight (8) years (5). More particularly, he worked as a "holdman", carrying out his duties in the lower part of the ships upon which he worked (5).

As a holdman, he was a member of a regular gang (5). The man in charge of the gang - or "hatch boss" - was MICHAEL BOSCO (5, 25-26). At the time of the trial, plaintiff had been in BOSCO's gang about seven (7) years (5). Plaintiff and BOSCO were employed by the PITTSTON STEVEDORING CO. (6, 9).

On the day of the accident, plaintiff was working on a ship docked at Pier 10 in Brooklyn (5-6). He had started work at 8 A.M. in the number 2 hatch, on the second deck (6).

*Numbers, unless otherwise indicated, refer to pages of the JOINT APPENDIX.

When he arrived that morning at the hatch, it was half-open and half-closed (7); and testimony of plaintiff's working partner, PERITRE, 47-48). The reason the hatch was helf-open and half-closed was that cargo had been placed on one of the steel plates which, when all of them were in the "closed" position, closed the hatch completely, and when in the "open" position, in part or in whole, left the hatch open, in part or in whole, to the extent that one or more of the steel plates was in the "open" position (47-48).

Plaintiff's assignment that morning was to load cargo (7). In order to do so, he and his fellow longshoremen used pallets, wires, skids - "all kinds of gear" customarily employed to load general cargo (7).

Among the devices used was one which, from plaintiff's description, was a gasoline-driven hi-lo (7-8, 11). He described it as having two blades which pick up the cargo, raise it, and deposit it where it is to be stowed (7-8).

The hi-lo was in operation at 8:15 A.M., as soon as plaintiff and his fellow-longshoremen began to work (32).

Plaintiff worked in the hatch the entire morning, from 8 A.M. to 12 noon (8, with 6). During that time they had a problem with "smoke down in the hole" (8), meaning the hatch (8-9). The smoke or fumes (10) came, of course, from the gasoline-driven hi-lo (40). The smoke or fumes affected

- "bothered" - him (10). More particularly, they gave him a "suffocating" feeling, and made him feel dizzy (10-11). He had never experienced such difficulties before (12, 39-40). Another longshoreman was coughing as a result of the fumes (11). Plaintiff, however, continued to work (10).

As for ventilation - or the absence of ventilation - for the fumes, these were the facts: The hatch in which plaintiff and the other longshoremen were working was, as already indicated, half-open and half-closed (7; testimony of plaintiff's working partner, PERITRE, 47), thus reducing the available ventilation by fifty (50%) per cent. The reason the hatch was half-open and half-closed, as also already indicated, was that cargo had been placed on one of the steel plates which, when all of them were in the "closed" position, the hatch was completely closed. When they were in the "open" position, in part or in whole, they left the hatch open to the extent that onr or more of the steel plates was in the open position (47-48). To the extent that the hatch was open, there was ventilation; to the extent that it was closed, ventilation was blocked. As already stated, the hatch was half-open and half-closed.

There was no evidence that the cargo which covered the steel plate or plates had been stowed there by plaintiff or any of his fellow-longshoremen. There was also no evidence that plaintiff or his fellow-longshoremen or the steve-

dore had any authority to move said cargo in order to be able to raise/the cargo-covered steel plate or plates. In/connection, this court may take judicial notice of the widely-known facts (a) that cargo is stowed according to the instructions of the shipowner, and a stowage plan drawn by the shipowner, and given to the stevedore to follow, and (b) that the stevedore has no authority to alter the plan (see, for example, JOINT APPENDIX in HICKMAN v. JUGOSLAVENSKA LINIJSKA PLOVIDBA RIJEKA, "ZVIR", 2 Cir.; 77-7274, argued November , 1977).

Continuing with the facts concerning ventilation - or the absence of ventilation - for the fumes: While there was or were a blower or blowers in the hatch (cf. 8 and 9), it or they were not, however, functioning (8-9). When it or they functioned, it or they removed the stale air and brought in fresh air (9). Of course, in the process of removing the stale air, the blower or blowers would, at the same time, necessarily also remove any smoke or fumes in the hatch emanating from a gasoline-driven hi-lo.

The blower or blowers - which, plaintiff said, was or were the property of the PITTSTON STEVEDORING CO., plaintiff's employer, or of the ship (9) - was or were secured to the hatch, has or have a motor on top, "something like a cloth which hangs from it and runs down with a pipe", which is connected "up on the deck" (9). It "works with electrical current off the vessel which the vessel has" (9).

The hatch also had its own ventilating system - as distinguished from the blower or blowers (11-12, 37-38) - but that, too, was not working (12). The ventilating system was part of the ship itself, serviced the entire ship, and consisted of pipes set in the ceiling (37-38).

Since neither the blowers nor the ship's ventilating systems were working, and, as a result, plaintiff and his fellow-longshoremen were being bothered and affected by the fumes, the men yelled "up on deck saying that somebody should come down" (8), because the air was not too good (33). At that time, there were on the deck the deckman, the boss, the signalman, and one or two "shipmates" (10, 33), meaning, insofar as the latter were concerned, officers or members of the crew (10).

In response to the cries of plaintiff and his fellow-longshoremen, some officers or sailors - plaintiff, who did not know them, was not sure which they were (10, 40) - came down into the hatch, looked around, saw "that the thing was not working", said nothing, and then left (10, 40).

The reference to "the thing" in plaintiff's statement that somebody came down into the hatch and saw that "the thing" was not working, referred, or could have been taken by the jury, to have referred, either to the blower or blowers, or to the ship's ventilating system, or to both, or to the con-

cept that the ventilation which should have been provided by both was not working.

In the foregoing connection, it should be noted that plaintiff's partner at work, PERITRE - whose testimony is summarized separately infra - stated that when, in response to the men's complaint, a ship's mate came into the hatch, a hi-lo was being operated, it was expelling fumes, and there was coughing among the men (53).

With respect to the non-functioning blowers, plaintiff said, "They send some man down, but they didn't appear to be very good" (33).

During the course of the day, in response to the men's complaint, the hi-lo was replaced by other hi-los, successively (11; testimony of plaintiff's working partner, PERITRE; 50, 51), but each of these, too, was gasoline-driven (51).

Despite the fumes and the effect thereof upon him, plaintiff continued to work from 8 A.M. to 12 noon, the time for the lunch break (10, 8, 11).

After the lunch break, which extended from 12 noon to 1 P.M. (11) - during which time plaintiff and the rest of his gang left the ship, plaintiff going home to eat (36) - plaintiff and his fellow-longshoremen resumed working in the same hatch, and worked there until 7 P.M. (11, 36-37).

During the day, as already indicated, the hi-lo which was exuding the fumes was replaced by other hi-los in succession (11). Each of them was owned by PITTSTON (PERITRE: 60). During the first half-hour of the operation of each replacement the amount of fumes would lessen somewhat, but then smoke or fumes would again fill the hatch (12). "There was a lot of smoke" (12).

The driver of each hi-lo was replaced every half-hour or so (41), but plaintiff and his fellow-longshoremen worked continuously in the hatch except for the lunch break of one hour (10, 8, 11, 36-37).

As the day progressed, plaintiff continued to feel ill (12). For example, his head "was spinning" (12).

No one entered the hatch to check the quality or composition of the air (14).

Plaintiff had worked on other ships when hi-los were being used, but he had never, on those occasions, experienced the difficulties he had to contend with that day (12). While he had previously worked in a half-open, half-closed hatch before, at a time when a hi-lo was being used, he and his fellow-longshoremen had been permitted to do so for only an hour or so, and then they would have to change hatches (13).

Plaintiff's Witness, ANGELO PERITRE

ANGELO PERITRE, called by plaintiff, testified that he had begun working as a longshoreman in 1960 (45). He had been employed by PITTSTON STEVEDORING CO. - who was also plaintiff's employer (6, 9) - for ten (10) years (45). He was a member of the MICHAEL BOSCO gang (45), as was plaintiff (5, 25-26). BOSCO was the "hatch boss" (5).

Every member of the gang, he said, had a partner (45). His partner on the day of the accident was plaintiff (45).

The gang started work at 8 A.M. (46-47), and he worked in the same hatch all day (46, 55). While PERITRE and the other members of the gang would work on different decks throughout the day - going to "lower holes"* to do so (55) - nevertheless, they always worked that day in the same hatch (55).

The hatch was half-open and half-closed because cargo was stacked on one or more of the steel plates which, when in a "closed" position, closed the hatch (47-48).

A gasoline-operated hi-lo was one of the devices which were being used to load the cargo (48-49). It was owned by the stevedore, PITTSTON STEVEDORING CO. (60).

During the morning "there was a lot of smoke" and

* "holes" is an obvious mistranscription of "holds".

fumes as a result of the operation of the hi-lo (50, 53). The fumes were so bad they caused coughing among the men (53).

The ship's ventilation system was not functioning that day (54). PERITRE was sure of this, he said, because when the system operated, it made a great deal of noise, but on this day he heard no noise (54-55). PERITRE and his fellow-longshoremen thought the ventilator was closed, so they reached up to it and opened it, but it did not function (60-61, 62).

There was also a blower installed by the stevedore (49). It was connected by a plug on the edge of the deck to the ship's electrical system (49). Evidently the blower was also not functioning that day, since the condition caused by the fumes did not get any better during the day (55).

PERITRE, plaintiff and the other members of the gang complained to the gangway men and the ship's mates about the hi-lo (51-52, 53, 55, 57, 61). The longshoremen complained that "we cannot stay like this" (53).

The gangwayman to whom PERITRE, plaintiff and the other members of the gang complained about the fumes being expelled from each successive hi-lo (51-52, 53, 55, 57, 61) - beside complaining to the ship's mates at the same time (id.) - was supposed to relay the complaint to the gang's supervisor, the hatch boss, BOSCO (57-58). Evidently, however, the gang-

wayman did not do anything, because at 12 noon - when the men took a lunch break (11) - when PERITRE saw BOSCO, PERITRE complained to the latter about the smoke in the holds (58-59).

During the afternoon, when the fumes persisted, PERITRE complained to the gangwayman (59).

In response to the various complaints, made to the gangwayman, to the mates and to BOSCO, one mate entered the hatch several times during the day (53, 61). While the mate was there, the hi-lo which was there was being operated, and fumes were being emitted (53). The mate looked around (53), but PERITRE did not state, nor did any other witness state, nor was any evidence of any kind introduced indicating, that the ship's ventilating system was thereafter restored to normal condition and made to function. Nor was there any evidence that the hatch, which was half-opened and half-closed, was thereafter opened all the way. Nor was there any evidence that the blowers were thereafter made to function.

While it is true that different successive hi-los, one at a time, were used throughout the day (50, 51), each of them, however, like the first, was gasoline-driven (51). Moreover, despite each successive replacement, the condition caused by the fumes - a hi-lo was in operation throughout the day (51) - did not, however, get any better during the day (55). And, as already noted, there was no evidence that the ship's ventilating system was at any time restored to proper

operation, or that the half-open, half-closed hatch was opened all the way.

PERITRE testified that he had seen a mate stop the work longshoremen were engaged in when the mate observed a dangerous condition involved in the work (57), and on many occasions he had seen mates give directions to the stevedore or hatch boss (56).

DEFENDANT'S WITNESSES ON THE ISSUE OF LIABILITY

MICHAEL BOSCO

Direct Examination

MICHAEL BOSCO, called by defendant shipowner, testified that he had been a hatch boss for fourteen (14) years (64). During the last five (5) years of that period plaintiff had been a member of BOSCO's gang (64). Plaintiff, he said, was a holdman (69).

BOSCO was asked about the hatch in which his gang had been working on May 31, 1973 (64-65), which was the day of the accident (5). Specifically, he was asked if the hatch was opened completely at the top, or only half-opened (65). He answered that he did not remember (65).

He remembered, however, that a hi-lo was used in the

hatch that day (65). The hi-lo belonged to PITTSTON (68). He also remembered that somebody had complained to him that the hi-lo was smoking too much (65). In response to the complaint, he replaced the hi-lo with another one (65).

When asked whether the complaints continued after the second hi-lo - or first replacement - was being used, he answered that he did not remember (65).

When asked how long his gang had worked that day, he stated that he did not remember (66).

When asked whether at any time during the afternoon anyone in his gang had complained to him that there was too much smoke down in the hatch and that the men were getting dizzy and coughing as a result, he answered that he did not remember (66).

When asked whether plaintiff complained to him that there was too much smoke in the hatch, he answered that he did not remember (66). However, as indicated above, he admitted that in response to a complaint, he had replaced the hi-lo with another one. (65).

When asked whether the stevedore used any blowers in the hatch that day, he answered in the affirmative (66).

When asked whether the blowers were working that day, he responded that he did not remember (67). When asked if the ship ventilators were working that day, he said that he did not remember (68).

When asked if anyone had complained to him about the blowers, he answered that he did not remember (67). But see p. 12, supra (third and fourth lines, and fourth complete paragraph).

He stated that after a hi-lo is put down in the hatch, tests are supposed to be made of the air in the hatch' (68). However, when asked if PITTSTON had had such tests made, he stated that he did not remember (68).

He stated that if anyone had told him that he was coughing, feeling faint and dizzy down in the hatch when "they were using the hi-lo", he would tell the foreman to stop the work (68).

When asked whether anyone had complained to him about the ship's ventilators, he said that he did not remember (68). But see p. 12, supra (third and fourth lines, and fourth complete paragraph).

He testified that if the ship's ventilators were not working, he would tell the foreman, and if the latter told him to stop the work, he would do so (69). However, when asked if he had stopped the work on the day of the accident, he stated that he did not remember (69).

When asked whether when his gang left the ship at the end of the day, he knew that anything had happened to plaintiff, he answered that he did not remember (69). He stated that the first time somebody told him about what had happened to plaintiff was the day after the accident (69).

MICHAEL BOSCO

Cross-examination

On cross-examination by plaintiff's counsel, BOSCO stated that he recalled that the mates on the ships had been talking about smoke in English (70).

He also stated that it is the practice of the mate to come to the hatch to see how the work is progressing (70). He also acknowledged that the mates go down into the hatch from time to time (70).

He also testified that if the mate sees something wrong - something dangerous "like too much fumes in the hatch" - he can stop the work (70). He himself - that is, BOSCO - he said, had no authority to stop the work (70).

In addition to the mate's having the authority to stop the work, the stevedore's foreman had the authority also (70).

When asked why he would change the hi-lo in a hatch - whether that was something he normally did for a particular reason - he answered

"Because there is too
much smoke" (71).

He did not remember, however, if the hi-lo was changed once or more (71), referring, presumably, to the day of the accident. But it was changed (65).

When work stops and there is a "detention", the steamship company has to pay the stevedore for its time (71). That is, when work stops, it costs the steamship company money (71).

Defendant's Witness,
REGINALD ERNEST KING

REGINALD ERNEST KING, called by defendant shipowner, testified that he was Safety Director of the United States Terminal, Inc. which was in the stevedore business (84).

KING testified that the primary duty to provide longshoremen with a safe place to work was on the employer or stevedore, but then acknowledged that if the employer does not do its job properly - that is, if the employer "works ships in a dangerous condition" - that fact in and of itself does not relieve the vessel of its obligation to provide a safe working environment for the men, at least "to a certain extent" (94). In connection with this obligation, he conceded that a vessel has an obligation to provide safe working equipment, but then immediately added, apparently in all seriousness, ".... but if the employer or the longshoreman uses that equipment which is faulty, then he is the person responsible under the law" (93).

He stated that it was necessary for ship's officers or foreign vessels to speak English in order to carry out their duties, and that it was his experience with foreign vessels in the Port of New York that the majority of ship's officers on such vessel invariably speak English (97).

He conceded that although a stevedore provides blowers for a hi-lo operation, the vessel still has to keep its own ventilation system operating (97); that is, he said, the blowers and the ventilating system are supposed to work hand in hand (97).

He acknowledged that if it is brought to the ship officer's attention that there is an excessive amount of fumes in a hatch which is causing the men to cough and complain, the ship's officer or captain has the authority to tell the stevedore to order the latter's men to stop working (103).

He stated that if a hi-lo is being used in the lower part of a hatch, and one-half of the hatch is opened, that would be a safe or normal condition, provided, however, that the hatch was being adequately ventilated (104).

Defendant's Witness, EDWARD BEDERWITZ

EDWARD BEDERWITZ, called by the defendant shipowner, testified that he was employed by plaintiff's employer, PITT-

STON STEVEDORING CORP., as an insurance manager, and had been so employed in June 1973 (110). The accident had taken place on May 31, 1973 (5).

MR. BEDERWITZ testified that he first received notice of an injury to plaintiff on June 14, 1973 (110).

MR. BEDERWITZ had with him a report concerning the matter, which he had made on the basis of (a) a visit which plaintiff had made to PITTSTON's offices on June 14, 1973, and (b) statements which plaintiff had allegedly made to him on said occasion (111-113, 125). The report was marked Defendant's Exhibit E for identification (30), and later admitted in evidence as Defendant's Exhibit E in evidence (125-126).

Plaintiff - who even four (4) years later, at the trial, in March, 1977, required an interpreter (3) - spoke nothing but Italian, and very broken English, on the occasion of said visit in June, 1973 (112). MR. BEDERWITZ, however, did not speak nor understand Italian, nor did he understand plaintiff's broken English (112). He did not understand plaintiff, and plaintiff did not understand him (144). Accordingly, MR. BEDERWITZ asked one of the company's secretaries, who, according to MR. BEDERWITZ, as stated, spoke and wrote Italian fluently, to translate (112, 125). He admitted, however, that she had not been hired as an interpreter, but as a secretary (113).

MR. BEDERWITZ admitted that he did not understand plaintiff, and that plaintiff did not understand him (114). Accordingly, he acknowledged that he did not know if the secretary's translation of what plaintiff said or allegedly said was accurate or not (114). He further conceded that it was possible that plaintiff did not state what was attributed to him in the report, or that the secretary did not accurately translate what plaintiff said (115).

The secretary's name, he said, was THERESA RIVIRSO (32). She no longer worked for PITTSTON, he said (118). He admitted knowing that "she is living in Brooklyn", but did not know "where she lives" (118-119) - meaning, presumably, her specific address. He admitted, however, that he could find out (119). He doubted that she was coming to court, because she had not been asked (119). In this connection, it is significant that defendant shipowner, however, did call as witnesses three (3) other persons who, like MISS RIVIRSO, were not in its employ/or control - namely, MICHAEL BOSCO, the hatch boss (63 et seq.), REGINALD ERNEST KING, the Safety Director for the United States Terminal, Inc. (84 et seq.), and MR. BEDERWITZ, who, as indicated, was an employee of PITTSTON (110 et seq.).

Notwithstanding the foregoing facts, and the further fact that the only person who could presumably have testified that the report MR. BEDERWITZ had made accurately reflected

what plaintiff had allegedly told him, through MISS RIVIRSO - we assume here that MISS RIVIRSO, had she testified, would have been able to establish that she was adequately qualified to interpret Italian - nevertheless, defendant, which knew that MISS RIVIRSO lived in Brooklyn, and could have ascertained her address, and, as noted, called as witnesses three (3) other persons who, like MISS RIVIRSO, were not in its employ or control, failed to call MISS RIVIRSO. MR. BEDERWITZ' only explanation for the failure so to do was that defendant's trial counsel had not asked for her (119).

Some idea of the accuracy of the report or reports which MR. BEDERWITZ made on the basis of MISS RIVIRSO's translations of his remarks to plaintiff, and plaintiff's remarks to him - as well as some idea of the accuracy of the translations themselves - can be gleaned from the following facts: Plaintiff came to PITTSTON's offices and saw BEDERWITZ on June 14, 1973 (110). At that time, BEDERWITZ, on the basis of MISS RIVIRSO's translations, made a handwritten report of the interview (111 and 112-113, to be read with 116 and 118, 125, 125-126). The report - which was first marked Defendant's Exhibit E for identification (111), then admitted as Defendant's Exhibit E in evidence (125-126) - states that plaintiff had seen DR. DUNAWAY on June 13, 1973 (117-118), which was the day before plaintiff came to PITTSTON's offices, and was interviewed by BEDERWITZ, through MISS RIVIRSO, and BEDERWITZ made out his

handwritten report of said interview. The report states that plaintiff's visit to DR. DUNAWAY was plaintiff's first visit to the latter (118-119). Notwithstanding all these facts, the report nevertheless states - allegedly reflecting what MISS RIVIRSO told BEDERWITZ plaintiff had told her in Italian - that plaintiff was <u>not</u> under a doctor's care, and that he would not tell BEDERWITZ what doctor he wanted to see (118). Did the report correctly reflect what plaintiff told MISS RIVIRSO in Italian?

Some idea of the kind of credence to be given to MR. BEDERWITZ's testimony can also be gathered from the following additional facts. MR. BEDERWITZ testified that a typed report of the accident had been sent to the Department of Labor (116). He had it with him (116), and it was marked for identification as Plaintiff's Exhibit 4 for identification (116-117), and later received in evidence as Plaintiff's Exhibit 4 in evidence (126).

MR. BEDERWITZ stated that the typed report sent to the Department of Labor had been based upon his handwritten report (116). (The latter, as already noted, was Defendant's Exhibit E for identification (111), later received in evidence (126)). Nevertheless, whereas in the handwritten report MR. BEDERWITZ gives a specific description of the accident - that is, that report referred to a hatch and a deck, hatch #2, lower hold, the place of the accident, and

specified the time thereof (126) - his typed report, on the other hand, has no such description, but merely a bare statement that BEDERWITZ had no knowledge of any accident, and in answer to the inquiry for the exact place where the accident occurred, he had said "unknown" (126). Was BEDERWITZ's testimony entitled to credence?

> The unexplained failure of defendant - who called as witnesses, on the issue of liability, three (3) persons who were neither in its employ nor control - to call, or even to explain its failure to call as witnesses, other persons who were both in its employ and control, who, if plaintiff's evidence as to liability, as well as that portion of the testimony of defendant's own expert as to liability which was also favorable to plaintiff, could have been controverted, would presumably have been able to do so.

Notwithstanding the fact that defendant shipowner called as witnesses, on the issue of liability, three (3) persons who were neither in its employ nor control - BOSCO, the hatch boss employed by PITTSTON, the stevedore (63, et seq.); REGINALD ERNEST KING, the Safety Director of the United States Terminal, Inc., a stevedore (84, et seq.), and EDWARD BEDERWITZ, the insurance manager for PITTSTON (110 et seq.) - nevertheless, it failed to call, or even to explain its failure to call, as witnesses, other persons who were both in its employ and control who, if plaintiff's evidence on the issue of liability, as well as that portion of the testimony of defendant's own expert on the issue of liability which was favorable to plaintiff, could

have been refuted, would presumably have been able to do so. Specifically, the defendant shipowner failed to call, or to explain its failure to call, on the issue of liability, any officers, mates or members of the crew, who, if either the evidence given on behalf of plaintiff, or the evidence given by defendant's own expert which was favorable to plaintiff, could have been disputed, would presumably have been able to do so. This subject is dealt with more fully in POINT I of the ARGUMENT, infra.

THE EVIDENCE AS TO PLAINTIFF'S INJURIES AND DAMAGES

Plaintiff, ANTONIO MARRALE

On May 31, 1973, the day of the accident herein, plaintiff was 48 years old, less nine days (9) (cf. 4 and 5).

As already noted, the smoke and fumes from the successive gasoline-driven hi-los bothered plaintiff (10), made it difficult for him to breathe (11), and made his head spin (12), with resulting dizziness (10-11). The fumes were so bad that it caused coughing among the men (11).

Plaintiff had never experienced chest pains or difficulty in breathing before May 31, 1973 (39-40).

Despite the fumes and their effect upon him, plaintiff worked from 8 A.M. to 12 noon (10, 8, 11), and, after a lunch break of one hour, from 12 noon to 1 P.M. (11), he worked from 1 P.M. to 7 P.M. (11, 36-37).

From the ship, he went directly home (14). He ate a light supper, and retired about 7:30 P.M. because he didn't feel well (14).

At about 1:30 or 2 A.M., he felt so bad he called to his wife and told her he couldn't breathe (14-15). "I felt my chest as if I was suffocating" (14). He had never had any chest pains before May 31, 1973 (224).

His wife called the owners of the house in which they lived, who, in turn, called the police (15).

The police called an ambulance (15). During the hour or two before the ambulance arrived, plaintiff sat in a chair, in pain, perspiring, sweating, nauseous, "spitting like black stuff", and having difficulty breathing (217). He was frightened (217).

He was helped out to the ambulance, where one policeman sat in the front, and one in the back (218). His wife also accompanied him in the ambulance (218).

In the ambulance, he was placed in a reclining position, and given oxygen to help him breathe (218). He had never been given oxygen before (218). He was scared (218).

At the hospital - the Long Island College Hospital (15) - he was taken to the emergency room (218). He was placed on a table, in a reclining position, given injections, and a cardiogram was taken (218). He was in the emergency room three (3) to four (4) hours (219).

He was then given a continuous intravenous injection (219), and with the intravenous apparatus still attached, he was taken to another room (219).

At the time he was still having trouble breathing (219), and felt nauseous (223). He couldn't talk because "I was suffocating" (219).

He remained in the hospital about one week (16). During that time he was confined to bed (16).

At the hospital, X-rays of his chest were also taken, and he was, in addition, given pills and injections - the full treatment (15, 16, 42).

For the first four (4) days of the hospital stay, he was attached to the intravenous apparatus (219).

When he was discharged from the hospital, he was still experiencing difficulty breathing (17). The doctor told him that when he got home, he should go to bed (220). From the hospital, he went directly home (16).

He then came under the care of Dr. Dunaway (17-18). Dr. Dunaway took X-rays, gave him an injection, some pills and medication (18). He saw Dr. Dunaway three (3) times a week, but did not remember the period of time involved during which he saw him three (3) times a week (18). Then he used to visit Dr. Dunaway twice a week, and then once a week (18). He did not remember when those visits terminated (18).

On June 29, 1973, in response to a telegram from Italy stating that his wife's mother was ill (18), he and his wife went to Italy (19). He has two brothers there, and his wife has her whole family there (19).

He remained in Italy for 1-1/2 to 2 months (9).

During that period, his chest bothered him - he had a burning in the chest (220) - and he could hardly breathe (19). He had never had trouble breathing before May 31, 1973 (19-20), and he had never had chest pains before that date (224).

He consulted a Dr. Orlando in Italy - in the town of Licata - for his complaints (19-20, 43). He was also X-rayed by X-ray technicians or other doctors (20). And he was also given injections (21).

He saw the doctors in Italy twice a week while he was there (211), which, as stated, was 1-1/2 to 2 months (21). Six (6) times he went to the doctor's office, and ten (10) times the doctor came to see him (220). The doctor came to see him because plaintiff couldn't walk due to shortness of breath (220). Plaintiff also felt dizzy while in Italy (220).

He paid the doctors in Italy whom he consulted, and received reports from them (20, 21). One of these reports, by a Dr. Luigi Tirri, who had taken X-rays of plaintiff, together with the translation of said report, previously made by the court interpreter - presumably on a private basis - and attached to the report, was marked Plaintiff's Exhibit 1 for Identification (21-22).

Plaintiff was then shown three (3) more documents, two (2) in Italian and one (1) in English, and was asked if the two in Italian were the two he had obtained from "the doc-

tor", and he answered "Dr. Orlando" (22). Attached to one of them was the court interpreter's translation (22). The document was marked Plaintiff's Exhibit 2 for Identification (22). The reports and translations thereof, however, were excluded from the evidence proper (22).

Plaintiff returned from Italy in September (22-23). He did not remember whether he returned to Dr. Dunaway (23). He did, however, visit the I.L.A. clinic because he did not feel well (23, 223). See Dr. Dunaway's testimony (pp.33-34, infra), in which he reviews the clinic's records.

A few days after he returned from Italy, he went back to work (23). However, he was not paid from May 31, 1973, until the middle of September 1973 (23). It was stipulated that his average weekly wages on May 31, 1973 had been $242 (23-24). Thus, for the fourteen (14) weeks of his absence from work, he had lost about $3388.

After he returned to work, he did not feel too well (24).

He testified that his chest always bothers him (25). He takes pills, which give him some relief (25). Sometimes he has shortness of breath at work (225).

He still works occasionally in the presence of hilos (25). When he does, he said, "I can't breathe" (221).

Before the accident, plaintiff used to smoke occa-

sionally (39). After the accident, he would smoke, but when he saw that it didn't make him feel too well, he stopped (39).

Plaintiff's Physician, DR. WILLIAM DUNAWAY

WILLIAM DUNAWAY, called by plaintiff, testified that he was a physician duly licensed to practice medicine in the State of New York with offices at 930 Third Avenue (170, 171). He was graduated from medical school in 1930, was a post-graduate student in New York for five (5) years, and had been specializing in surgery since 1935 (171), or a total of thirty-two (32) years at the time of the trial. His offices had been at 930 Third Avenue since 1949 (171), or a total of twenty-eight (28) years at the time of the trial.

On June 19, 1973, plaintiff came to his office, and Dr. Dunaway saw him (171; 172). The history which he gave was as follows: While working in the hatch he had been overcome by fumes due to the use of hi-lo machines all day long (171). The next morning, he was taken by ambulance to The Long Island College Hospital, admitted, and discharged on June 8, 1973 (171). Dr. Dunaway made a note reading "Claimant was complaining of pains in chest, dizziness and felt nauseated, reason for admitting him for admission to the hospital" (sic; 171-172).

X-rays of plaintiff's chest proved negative (172). On the basis of plaintiff's complaints and the examination that day, Dr. Dunaway concluded that plaintiff was suffering from an irritation from the upper respiratory tract and lower respiratory tract - his windpipe - possible gas fume irritation (172).

Dr. Dunaway treated plaintiff symptomatically - that is, plaintiff was given medication for discomfort, medication for breathing difficulties, sedatives, and instructed to rest at home (173).

Dr. Dunaway saw plaintiff on seven (7) different occasions - the last time on June 27 (173). At that time the treatment of plaintiff was still the same as before (173).

When Dr. Dunaway saw plaintiff last, on June 27, plaintiff still had the same complaints (173).

Dr. Dunaway did not discharge plaintiff on June 27 (173). Instead, he understood that plaintiff was going, or had gone, to Italy to see an ill relative on June 28 (174). Dr. Dunaway had not seen plaintiff since June 27 (174).

Dr. Dunaway stated that during the period in June, 1973, when he saw plaintiff, the latter was unable to work as a longshoreman (180).

Dr. Dunaway was shown the records of the Long Island College Hospital relating to plaintiff's hospitalization (174). He reviewed them while on the witness stand, and interpreted them (174).

Dr. Dunaway stated that the fact that plaintiff was admitted in the early hours of the morning - plaintiff arrived at the hospital about 2:30 A.M., was taken to the emergency room, and admitted at 5 A.M. (177) - indicated that the doctors at the hospital thought he was very sick, since they usually do not admit a patient at such a time unless they think the patient is very sick (177).

The admission diagnosis, he said, was coronary insufficiency (174). The discharge entries, however, indicate that said diagnosis was not confirmed, the discharge diagnosis being chest pains, cause unknown (174).

At the time of admission, plaintiff complained of pain in the chest - burning pain in the chest - difficulty in breathing, sweating, and coughing up black sputum (175).

At the hospital, plaintiff was given intravenous glucose solution, which confined him to bed and sedatives, and X-rays and electro-cardiograms were taken (177-178). The electro-cardiograms proved negative (178). Presumably, the X-rays also proved negative.

Plaintiff's counsel asked Dr. Dunaway the following "hypothetical" question:

> "Q Now, bearing in mind that Mr. Marrale the previous day to his admission, he was admitted in the early morning hours. He had been working as a longshoreman in a hatch from 8:00 in the morning 'til 12:00 noon, and then from 1:00 o'clock in the afternoon until 7:00 o'clock in the evening; that he was working down in one of the lower decks, and that the hatch above him was not entirely open, half of it was closed and half was opened; a high-low machine was operated in the hatch the entire day and the fumes from the machine were such that it was changed one, two, or three different times; one or more blowers on sleeves had been lowered into the hatch to draw the fresh air from out above and below down into the hatch, and the ship's ventilating system was not working at all. Mr. Marrale was exposed to this all day. He coughed during the day and he felt weak and dizzy; he went home at 7:00 o'clock that evening, had some broth and went to bed; he was awakened in the early morning hours gasping for air, having difficulty breathing with a tight burning sensation in his throat and upper chest in the middle; an ambulance was sent for and he was rushed to Long Island College Hospital where he was admitted -- and you have the record of the admission before you -- he remained there for some seven or eight days; electrocardiograms were taken and they were all negative.
>
> Do you have an opinion based upon reasonable medical certainty whether or not the incident that I have described to you, working in the hatch and being exposed to those fumes throughout the day was a competent producing cause of the symptoms that he complained of, and that he was admitted to the hospital for."

Dr. Dunaway, who had, as indicated, obtained a history from plaintiff (summarized above), examined him and treated him on seven (7) separate occasions, answered that

> "It is my opinion he had suffered some damage to his respiratory tract by being subject all day long to the fumes" (177).

Dr. Dunaway was informed by plaintiff's counsel that subsequent to plaintiff's final visit to Dr. Dunaway, plaintiff went to Italy, saw a physician there, had his chest X-rayed, received injections and medications, and continued to suffer from the same or similar symptoms (178). He was asked whether he had an opinion based on reasonable medical certainty whether these symptoms and that treatment were related to the condition which Dr. Dunaway previously described and found (179). He stated that in his opinion it was a continuation of the same episode he had seen in his office, and that he believed that probably plaintiff was suffering from irritation of the respiratory tract in Italy (179).

Dr. Dunaway was asked to assume further that with those symptoms and that treatment plaintiff continued to cough occasionally and felt a weakness (179); that plaintiff had the symptoms in Italy referred to; that the symptoms Dr. Dunaway had observed and the condition plaintiff complained of in Italy, could plaintiff with that condition and those symptoms work at that time as a longshoreman climbing up and down ladders off and on cargo, lifting different types of weights of cargo, and working on hatches where hi-los would be used from time to time (174-180, 180). Dr. Dunaway answered that it was his impression that plaintiff could not have worked at the time (180).

Dr. Dunaway was asked to review the ILA Clinic records of plaintiff's visits to seek treatment at said clinic, which defendant's counsel had placed in evidence (183). Those records showed the following: Subsequent to the accident - which took place on May 31, 1973 (5) - more particularly, on January 23, 1974, plaintiff complained of head and chest pains and coughing (186). On February 2, 1974, he had chest complaints (186-187). In March, 1974, plaintiff complained of chest oppression on exertion (187). On April 24, 1974, he again complained of chest oppression on exertion (187). In May, 1974, he complained of substernum chest pains which lasted all day (187). The records showed that this was not cardiac pain (187).

In May, 1974, plaintiff was at the clinic for a G.I. series and tightness in chest, dizziness, and shortness of breath (188). On March 31, 1975, he had been complaining three (3) days, and had chest pain (188). On April 3, 1974, he reported a persistent cough (188).

On October 27, 1975, he complained of coughing (189). In December 1975, and on February 6, 1976, he complained of "three days increased coughing" (189). On February 17, 1976, he complained of coughing, producing yellow sputum, chest pains and fever (189). Then there is another report of a chest complaint (189). On February or March 13, 1976, he received medication for his complaints (189). On March 12,

1976, he complained of pain in the lungs (190).

In April, 1976, he complained of coughing, and his chest was X-rayed (190). On December 6, 1976, the complaints were coughing, sore throat and hoarseness (190).

Dr. Dunaway was asked whether the "at least seventeen (17) complaints" of coughing, difficulty in breathing and in the chest region since this incident (of May 31, 1973), recorded at the ILA Clinic, were, in view of the symptoms, their number and frequency, to be found in a normal individual (190-191). He answered in the negative (191).

He was asked whether he had an opinion, based upon reasonable medical certainty, whether the symptoms were related to the conditions which he had found and described, and he was asked to assume, before answering, that for the two years prior to the accident, plaintiff had had no complaints (191). Dr. Dunaway stated that he thought they were related (191).

Dr. Dunaway was asked whether he had an opinion whether or not such symptoms or conditions were permanent in nature in view of the fact that they had persisted since May 31, 1973 (191). Dr. Dunaway was testifying in March, 1977 (1), so that the symptoms had persisted for almost four (4) years. Dr. Dunaway answered that in his opinion, "it would be a permanent situation here" (191).

Dr. Dunaway was asked whether the condition was of the type which he would expect to improve or get worse, deteriorate or remain approximately the same (191-192). He answered, "Well, I think it would improve by now, but I think he is still complaining about the same thing he had before" (192).

He was then asked if he bore in mind the fact that plaintiff was still working as a holdman - the word "coalman" in the transcript is a manifest mistranscription for "holdman", which plaintiff was when he worked (5) - and was still being exposed from time to time to fumes and ashes from hi-los, would such facts affect plaintiff's condition (192). Dr. Dunaway asked, "You mean working with fumes?", and plaintiff's counsel answered in the affirmative (192). Dr. Dunaway answered, "I would think so" (192).

Dr. Dunaway was asked what kind of effect would working with fumes have, and he answered that it would aggravate plaintiff's present condition (192).

Dr. Dunaway stated that his own charges for seven (7) visits by plaintiff had been $76, and that that sum was reasonable (181-182).

Dr. Dunaway was asked to assume that plaintiff, while in Italy, had seen "this doctor" six (6) times at the latter's office, and that the doctor had made ten (10) house

calls; that X-rays had been taken of plaintiff's chest on one occasion, and that the doctor had given plaintiff injections (181). Dr. Dunaway was then asked what the reasonable value of said services were (181). He answered "$100", and that that sum was very reasonable (181).

Dr. Dunaway was shown the Long Island College Hospital bill, which was then received in evidence as Plaintiff's Exhibit 2 in evidence (182-183). He was asked if the amount of the bill - $1,125 - was reasonable for the services described (182). He answered that the bill was in keeping with the rate of $97 a day for a bed, and was a reasonable charge (182).

Dr. Dunaway stated that with respect to plaintiff's visits to the ILA Clinic, there was no indication on the bill for said services that it had been paid (183). He answered that he did not see where it had been paid, and that it appeared to be an outstanding bill (183). The amount of that bill was $

The unexplained failure of defendant to produce any evidence, medical or otherwise, to controvert plaintiff's evidence of injuries or his medical evidence.

Defendant failed to produce, or even to explain its failure to produce, any evidence, medical or otherwise, to

controvert plaintiff's evidence of injuries or his medical evidence.

Plaintiff's life expectancy

The court charged the jury, without exception, that plaintiff - who was 51 years of age at the time of the trial (4) - had a life expectancy of 22-1/2 years (252).

Defendant's motions prior to the verdict

After the jury had been charged and had retired to deliberate, the court stated that it would hear motions, and deem them to have been made at the end of the plaintiff's case, and at the end of the whole case (161-162), presumably respectively.

Thereupon, the defendant moved to dismiss, in effect at the end of plaintiff's case, and in effect at the end of the whole case (162-164). The court denied the motions (164).

The special findings, answers to which the jury were instructed to return on the issue of liability.

In its charge on the issue of liability, the court directed the jury to answer certain questions (156): (1) Was the defendant negligent in any way that caused harm to plaintiff (156)? If the answer was "yes", then the jury was to answer question (2) - namely, what percentage of the total negligence causing the harm was attributable to the defendant? (157), and question (3): Was plaintiff negligent in any way that caused harm to himself? (157). If the answer to question (3) was "yes", then the jury was instructed to answer question (4) - namely, what percentage of the total negligence causing the accident was to be attributed to plaintiff? (157).

The jury answered with "yes" question (1) - namely, was defendant negligent in any way that caused harm to plaintiff? (165)

The jury answered question (2) by stating that 50% of the total negligence causing the harm was attributable to defendant (165).

The jury answered "no" to question (3) - namely, was plaintiff negligent in any way that caused harm to himself? (165)

The verdict on damages

After being charged on the issue of damages (250-253), the jury returned with the following verdict: $73,000 plus salary for June, and hospital expenses (254).

The court said, "Give us the total" (254).

The forelady replied that "The salary for June is $968" (254). The parties had stipulated that plaintiff's weekly wages were $242 (251). Thereupon the court instructed the jury to retire, use pencils, and agree on the amount of the verdict (254). The jury retired (254).

They then returned with a verdict in the amount of $75,000 (254-255).

The amount of the loss of wages for June, as already noted, was $968. The amount of the hospital bill was $1,125 (182). Adding $968 and $1,125 produces $2,093. The original verdict of the jury, as indicated, was

> "$73,000 plus salary for June and hospital expenses" (254).

$73,000 + $2,093 produces $75,093. The jury, as noted, returned a verdict, the second time, in the amount of $75,000 (254-255).

Defendant's motion to set the verdict aside as excessive; the court's denial thereof, and the court's accompanying reasons.

Defendant moved to set the verdict aside as excessive (256-257).

The court denied the motion, saying (257):

"I don't believe it's excessive based on my observations of the plaintiff. I believe he has suffered very seriously if you believe him. The jury obviously did believe him, that was a matter for the jury...." (257).

Defendant's motion for judgment notwithstanding the verdict as to liability, and the denial thereof.

Defendant moved for judgment notwithstanding the verdict as to liability (257). The court denied the motion, saying,

"Ample evidence to support the verdict" (257).

ARGUMENT

I.

THE EVIDENCE WAS SUFFICIENT TO WARRANT THE JURY'S FINDING, IMPLICIT IN ITS VERDICT ON THE LIABILITY ISSUE, THAT THE DEFENDANT SHIPOWNER WAS NEGLIGENT, AND THAT ITS NEGLIGENCE WAS A PROXIMATE CAUSE OF PLAINTIFF'S INJURIES AND DAMAGES.

This Court has recently reaffirmed the related principles that

> "In enacting the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. section 901 et-seq., Congress intended to relieve shipowners of liability predicated upon the negligence of stevedoring companies. Napoli v. Hellenic Lines Inc., 536 F. 2d 505, 507 (2nd Cir. 1976). After the amendment, Congress said, the vessel would be liable only for its own failure to use reasonable care. Munoz v. Flota Merchante Grancolombiana, S.A. (Dkt. No. 76-7519) (2nd Cir. April 25, 1977) slip opin. 3147, 3153, which would be determined in accordance with land-based principles of negligence - Napoli, supra, at p. 507"
>
> Ruffino v. Scindia Steam Navigation Co. Ltd. (Dkt. No. 77-7017)(2nd Cir. July 18, 1977) slip opin. No. 1099; 4771, 4773.

The evidence in this case established - or so the jury could, as they did, find - that in the light of land-based principles of negligence, the defendant shipowner failed to use

reasonable care, and that its failure to do so was a proximate cause of plaintiff's injuries or damages. That evidence is as follows:

a) The evidence given, in the aggregate, by plaintiff, his partner, PERITRE, and their hatch boos, BOSCO, that the hilos which were used - one at a time, successively - throughout the day, in the hatch where plaintiff and his fellow-longshoremen were working, and which were gasoline-driven, throughout the day emitted, ejected or expelled smoke and funes which made it difficult to breathe, and caused dizziness and coughing (pp. 3a-3b, 5, 6, 7, 8-9, 10, 11-12, supra).

b) The evidence given by the hatch boss, BOSCO, that on May 31, 1973, he had heard the mates talking, in English, about smoke (p. 14, top, supra).

c) The evidence given by plaintiff and his working partner, PERITRE, concerning ventilation - or the absence of ventilation for the funes: namely first, that the hatch in which he, as well as other longshoremen were working on May 31, 1973, was half-open and half-closed (p. 3b, 8, supra), thus reducing ventilation by fifty (50%) percent. The reason that the hatch was half-open and half-closed was that cargo had been placed on the main deck - more particularly, on one of the steel plates (47-48), which, when closed, closed the hatch, and when open, permitted complete access to the air, but which, again, when closed, in part or in whole, blocked such access pro tanto (pp. 3b, 8, supra). There was no

evidence that the said cargo had been stowed there by either plaintiff or any of his fellow-longshorement or their employer, the stevedore, PITTSTON. Plaintiff respectfully requests this Court to take judicial notice of the widely-known fact that cargo is stowed on a ship according to a stowage plan which is constructed by the shipowner, and given to the stevedore to follow, and that the stevedore has no authority to alter said plan.

d) The additional evidence given by plaintiff and his partner, PERITRE, concerning ventilation - or the absence of ventilation - for the funes: namely, that neither the ship's own ventilation system, nor the blowers installed by PITTSTON, were functioning (pp. 4, 5, 5-6, 9, supra).*

e) The evidence given by plaintiff and by his partner PERITRE and their hatch boss, BOSCO, that plaintiff and/or PERITRE and/or their fellow longshoremen complained throughout the day concerning said conditions, not only to their own fellow employees (e.g.; the gangwaymen, the hatch boss, BOSCO, etc.), but also to the ship's officers, mates and other members of the crew (pp. 5, 9-10, 10, 12, supra).

f) The evidence given by BOSCO that he would change a hi-lo in a hatch if it emitted too much smoke (p. 14, supra), together with the additional evidence given by BOSCO that in response to a complaint on the day in question, he did in fact replace the (first) hi-lo with another one (p. 12, supra), plus

* And see, also, the evidence of defendant's expert that even if there are blowers, the ship's ventilation system must also be kept functioning (p. 16, supra).

the evidence given in the aggregate by plaintiff, PERITRE and BOSCO that the original hi-lo in the hatch that day had been replaced, and more than once (pp. 6, 7, 10, 12, supra).

g) The evidence given by BOSCO that the mates go down into the hatch from time to time, and that it is their practice to come to the hatch to see how the work is progressing (p. 14, supra).

h) The evidence given by plaintiff and his partner PERITRE that in response to their and other fellow-longshoremen's complaints about the fumes, one or more of the ship's officers and/or mates entered the hatch, and on more than one occasion (pp. 5 and 10, supra); that on each of said occasions, a gasoline-driven hi-lo was in operation, and was ejecting or expelling fumes (p. 10, supra), and that the ship's officers and mates looked around and left (pp. 5 and 10, supra. In this connection, there was no evidence that after the visits by the ship's officers and mates, the cargo on one of the steel plates covering the hatch, and causing it to be half-closed (and thus half-open), was moved, and the steel plate raised or pushed aside so as to make the hatch fully open; nor was there any evidence that after said visits, either the blowers or the ship's ventilating system functioned.

i) The evidence given by PERITRE that he had seen a mate stop the work longshoremen were engaged in when the mate observed a dangerous condition involved in the work, and that on many occasions he had seen mates give directions to the stevedore

or hatch boss (p. 11, supra).

j) The evidence given by BOSCO, the hatch boss, that if the mate sees something wrong, something dangerous, "like too much fumes in the hatch", he can stop the work (p. 14, supra).

k) The evidence given by the defendant's own expert, King, that if it is brought to the ship officer's attention that there is an excessive amount of fumes in a hatch which is causing the men to cough and complain, the ship's officer or captain has the authority to tell the stevedore to order the latter's men to stop working (p. 16, supra).

l) Defendant - who called as witnesses three (3) persons, none of whom was even in either in its employ or control (p. 21, supra) - failed to call, or to explain its failure to call, as witnesses, other persons who were both in its employ and control - e.g. the ship's officers, mates and members of the crew - and who, if plaintiff's evidence as to liability, as well as that portion of the testimony of defendant's expert KING as to liability which was favorable to plaintiff (see item "k" above), could have been controverted, would presumably have been able to do so.

Can there be any question but that the foregoing evidence, considered in the aggregate, established - or so the jury could find - (a) that the defendant had both actual and constructive knowledge of the existence - and the length of time of the

existence - of the fumes in the hatch, but failed to use reasonable care, as defined by, and determined in accordance with, land-based principles of negligence, either to prevent or correct said dangerous condition, and (b) that defendant's failure to use reasonable care was a proximate cause of plaintiff's injuries and damages. See Ruffino v. Scindia Steam Navigation Co., Ltd., supra, (Dkt. No. 77-7017) (2nd Cir. July 18, 1977), slip opin. No. 1099; 4771, 4773.*

There is, moreover, a separate reason why defendant was properly found to be liable. The evidence established - or so the jury could find - that the defendant exercised control over the work of the longshoremen and the conditions thereof, in that its officers and mates had the power to stop said work if the existence of a dangerous condition was brought to their attention, and had actually done so in the past (see items "i", "j", and "k" above). Such power is evidence of control. Smullen v. City of New York, 28 N.Y. 2nd 66, 69-70, and p. 70 (center); and pp. 71-72, to be read with p. 69; Tilkins v. Niagara Falls, 52 A.D. 2nd 306, 312 (4th Dept., 1976); Broderick v. Cauldwell-Wingate Co., 301, N.Y. 182, 188; see Merced v. Auto-Pak Co., Inc., 533 F. 2nd 71, 80 (left hd. col., first third) (2 Cir., 1976), citing Broderick in a derivative context. Since defendant - or so the jury could find - exercised control over the work of the longshoremen and the conditions thereof, manifestly, if the conditions became, as they did in the case at bar, dangerous, and resulted in injury, defendant is responsible.

* Of course, defendant was additionally negligent in not having its ventilation system functioning (see footnote at p.43, supra).

II.

THE VERDICT WAS NOT EXCESSIVE. THIS IS ESPECIALLY TRUE IN ABSENCE OF ANY ATTEMPT BY DEFENDANT EITHER TO CONTROVERT THE MEDICAL TESTIMONY GIVEN ON BEHALF OF PLAINTIFF OR TO SHOW ANY IMPROVEMENT IN HIS PHYSICAL CONDITION DURING THE FOUR (4) YEARS WHICH ELAPSED BETWEEN THE DATE OF THE ACCIDENT AND THE TIME OF TRIAL.

Prior to May 31, 1973, plaintiff had had no difficulty in breathing, shortness of breath, chest pains, dizziness or chronic coughing (pp. 3, 23, 26, supra). However, beginning with his day-long exposure to the fumes emitted by the succession of hi-los (pp. 3a-3b, 5, 6, 7, supra), and continuing to the time of the trial (March, 1977) - a period of almost four (4) years - plaintiff regularly experienced chest pains, fits of coughing, dizziness, difficulty in breathing, shortness of breath, and other abnormal symptoms and signs of distress (pp. 3a-3b, 5,6,7, 23, 24, 25, 27, supra).

Plaintiff's treating physician, Dr. Dunaway, a surgeon, testified on the basis of a history elicited from plaintiff (p.28, supra); his examinations of plaintiff, and the latter's seven (7) visits to his office (pp. 28-29, supra); the records of the Long Island College Hospital (p. 30, supra); ILA Clinic records (showing seventeen (17) vists by plaintiff, from January 1974 to December, 1976, on each of which he complained of one or more symptoms or signs of distress such as coughing, yellow sputum, chest pains, difficulty in breathing, shortness of breath, etc. (pp. 33-34, supra), and an extended hypothetical question (p.31,

supra). He stated that in his opinion plaintiff had suffered respiratory tract damage as a result of his day-long exposure to the fumes in the hatch (p. 31, supra). He further stated that plaintiff's conditions and complaints were permanent in nature (p. 34, supra). Finally, when informed that plaintiff was working in the presence of hi-los, which emit fumes, he stated that this fact would aggravate plaintiff's condition and complaints (p. 35, supra).

Plaintiff, who was 51 years of age at the time of the trial, had a life expectancy of 22 1/2 years (p. 37, supra). The hospital bill was $1125, which was reasonable (p. 36, supra). Dr. Dunaway's bill was $76. which was reasonable (p. 35, supra). The bill or bills of the Italian doctor or doctors was $100. which was reasonable (pp. 35-36, supra). He was out of work from the end of May, 1973 to the early part of September (p. 27, supra, to be read with pp. 23-26, supra, passim), or a total of about fourteen (14) weeks. His weekly wages were $242. (p. 39) His total loss of wages, accordingly, was about $3388.

The jury returned a verdict of $75,000. (p. 39, supra). The court denied the motion to set aside the verdict as excessive, saying (257)

> "I don't believe it's excessive based on my observations of the plaintiff. I believe he has suffered very seriously if you believe him. The jury obviously did believe him, that was a matter for the jury."

We submit that the verdict was not excessive. Nor may it be deemed excessive in view of the absence of any attempt by defendant to controvert the medical testimony given on behalf of the plaintiff or to show any improvement in his physical condition during the almost four (4) years which elapsed between the date of the accident and the time of trial. See McDermott v. City of New York, 7 A.D. 2nd 745, affd 6 N.Y. 2nd 822, which applies the principle stated directly above.

CONCLUSION

The Judgment should be affirmed.

Respectfully submitted,

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Service of Two (2) Copies of within Brief is hereby admitted - 1-6-78

[illegible]
Attys for Deft. appellant

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